

EXHIBIT “E”

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Sullivan County Clerk's Index No. 392/98
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION THIRD DEPARTMENT

SUSAN ALAIMO and VINCENT ALAIMO,
individually, and SUSAN ALAIMO and
VINCENT ALAIMO, parents and Natural
Guardians of MINETTE ALAIMO, an
Infant,

Plaintiff-Appellants,

-against-

GENERAL MOTORS CORP. AND THEIR
MANUFACTURERS, AGENTS AND SUBCONTRACTORS,
AND FULTON CHEVROLET-CADILLAC CO. LTD.'
jointly and severally,

Defendants-Respondents.

RECORD ON APPEAL

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I.

PRELIMINARY STATEMENT

Plaintiffs-Appellants Vincent Alaimo, Susan Alaimo and Minette Alaimo appeal to the Supreme Court of the State of New York, Appellate Division Third Department, from a Judgment of the Supreme Court of the State of New York, Sullivan County, which dismissed their action against defendant-respondent General Motors Corp.,¹ after a jury verdict in General Motor's favor after trial.

The bare facts of this incident are that on the morning after a night of snow and ice Vincent Alaimo crashed his General Motors Chevy Blazer vehicle into a tree in Sullivan County² He was injured as result of the accident due to the failure of the Blazer's airbag to deploy.³

II.

JUDGMENT APPEALED FROM

Appellants appeal from a Judgment of the Supreme Court of Sullivan County what dismissed their complaint after a jury verdict in favor of respondent on the issue of liability.⁴ A timely Notice of Appeal was interposed.⁵

¹ Defendant Fulton Chevrolet-Cadillac Co., Inc., was dropped from this case.

² Tr. 8-12, 56.

³ "No. No. To my knowledge it [the airbag] never inflated." (Tr. 16).

⁴ R. 1.

⁵ R. 2.

III.

QUESTIONS PRESENTED

1.

Whether eyewitness testimony as the fact that plaintiff's airbag did not deploy cannot be confuted by non-witness paid expert testimony?

It is respectfully submitted that this question be answered in the affirmative.

2.

Whether a jury verdict based on the testimony of non-witness paid experts is against the weight of the evidence.

It is respectfully submitted that this question be answered in the affirmative.

IV.

STATEMENT OF FACTS

Appellants commenced this accident seeking damages for personal injury and loss of consortium from an accident that occurred in Sullivan County where Vincent Alaimo's Chevrolet motor vehicle struck a tree and Alaimo suffered injuries because the vehicle's airbag did not deploy.

Summary of the Evidence

The evidence of this case is comprised of eye-witness testimony as to the accident itself, expert testimony as to the condition and operability of the motor vehicle and medical

evidence as to Vincent Alaimo's injuries. In other words, there were two (2) eye witnesses to the accident and other evidence that was created away from and outside the accident scene based on Vincent Alaimo's medical treatment arising from the accident and various "examinations" of the vehicle, taking place at a considerable remove in time from the incident.

It is the conflict between the eye-witnesses evidence of what happened during the incident and the later created evidence of, perhaps, what should have happened had the motor vehicle's airbag system worked properly, which forms the issue for the Court: whether eye witness testimony can be confuted by mere opinion.

Trial Evidence

A.

Plaintiffs

There were two (2) fact witnesses as trial who testified about what they witnessed at the accident scene on February 21, 1995: appellant Vincent Alaimo and non-party Anthony Leone. The sum-and-substance of this eye-witness testimony is that the Alaimo vehicle skidded off a roadway in Sullivan County, struck a tree causing Vincent Alaimo to be injured when the Chevrolet vehicle's airbag did not deploy, i.e., failed to inflate.

The defense presented no eyewitness testimony impeaching the testimony that the air bag did not inflate on February 21, 1995.

Summary of Anthony Leone's Testimony

Anthony Leone, a volunteer fireman,⁶ Leone testified that he was following the Alaimo vehicle, a pinkish Chevy Blazer,⁷ and second later he saw it hit the tree when exiting Devine Road and entering Route 52.⁸ Leone was following 200-300 feet behind due to road conditions.⁹

The Alaimo vehicle proceeded along at a steady pace, braking periodically until Alaimo braked and the car "swept across the road".¹⁰

Leone, because of the accident, stopped "there to give any emergency personnel room in case there was something bag going on in the car because he hit the tree pretty good and I got out of the car and went and open[ed] his door to get him out of the car if I [could]".¹¹ All this occurring within 10-15 seconds.¹²

Vincent Alaimo Injured

Leone testified, "I looked in his eye. His eyes were rolling around...he was like in and out of consciousness..." "...I

⁶ Tr. 4.

⁷ Tr. 7.

⁸ Tr. 7-8.

⁹ Tr. 8.

¹⁰ Tr. 10-11.

¹¹ Tr. 12.

¹² Tr. 12-13.

seen the airbag was folding out of the steering column."¹³

"...[H]e was in all kind of pain...he was saying his chest hurt..."¹⁴

Seat Belt

"The seat belt was still around him."¹⁵ It was buckled.¹⁶

Alaimo also testified to buckling the belt and that it was touching his body while he was operating the car on February 21, 1995.¹⁷

The Air Bag Did Not Inflate: Part I

The air bag was "[c]oming out of the steering column. To my knowledge it didn't inflate."¹⁸ "It was a little folded [] it almost touched his legs." *Id.*

Q. ...[D]id you see any portion of the airbag from the middle of the steering wheel up towards the top of the steering wheel?

A. No.

Q. At any point while you were there outside of that care was any portion of the air bag above the center of the steering wheel?

A. No. No. To my knowledge, it never inflated.

Q. Was there any dust or power in the passenger compartment of that car, Mr. Alaimo's car?

A. No, sir, no.

¹³ Tr. 13.

¹⁴ Tr. 14-15.

¹⁵ Tr. 15.

¹⁶ Tr. 18.

¹⁷ Tr. 79-80.

¹⁸ Tr. 14.

Q. As the air bag was unfolding out of the hub of the steering wheel did it make any noise, any popping or exploding sound?

A. No.

Q. Did you hear any similar type of noise¹⁹ from the passenger compartment?

A. No. No.²⁰

Q. As you were making the observations about the air bag...did that air bag appear to you to be deflating?

A. No.

Q. With regard to what, if any degree of pressure was in it as far as you could observe, what did you observe?

A. I didn't see any pressure in it.²¹

Leone, in his training courses as a volunteer fireman for which he took state certified instruction²² had observed deployed airbags in the classroom and in the course of accidents. "I've seen it in a couple of accidents too. Air bags that are supplied and deflated and what they look like."²³

Leone testified that the pictures taken after the accident, Exhibit A-3, did not depict the air bag as it was on the date of

¹⁹ The witness testified to hearing hissing from the engine compartment. Tr. 16.

²⁰ Tr. 16-17.

²¹ Tr. 19.

²² Tr. 17.

²³ Tr. 17.

the incident, with the air bag on the date of the incident smaller and more folded than in the picture.²⁴

Leone, on cross examination, stated:

Q. Now, as I understand your testimony here today this air bag did not look like it had inflated, is that correct?

A. What I know today, it didn't inflate.

Q. Okay. It looked like it didn't inflate, didn't I just say that?

A. Yes.

Q. But you don't know one way or another?

A. No, I do now that it didn't.

Q. ...You don't know whether or not this air bag inflated. You didn't see it inflate, is that correct.

A. If it did I would have seen it inflated. ...²⁵

Severity of Accident

The accident and damages to the vehicle was severe:²⁶

Q. The front of the vehicle was pretty smashed up?

A. Yes.

Q. The damage was almost as far back as the bulkhead?

A. Yes.

Q. And the battery was destroyed?

A. Yes.

²⁴ Tr. 21, giving rise to the inference that the evidence was tampered with at some point or not preserved in the same state as on the day of the incident.

²⁵ Tr. 28-29.

²⁶ Appellants' exhibits 1-19 showing the site of the accident, the condition of the vehicle and the state of the air bag were all received in evidence. (Tr. 76).

Q. And one of the things you smelled when you got to Mr. Alaimo was battery acid in the air?

A. Yes. That was one of the things. There was antifreeze, too.²⁷

Clearly, the impact destroyed the front-end of the vehicle going back to the bulkhead between the engine compartment and the passenger cab.

Conclusion I

The unambiguous testimony of an eyewitness with state-certified training as a volunteer fireman in incidents such as these, is that the air bag on the Alaimo Chevy Blazer did not inflate/deploy despite the severity of the accident.

*Summary of Vincent Alaimo's Testimony*²⁸

On February 21, 1995, the date of the incident, Alaimo was driving a General Motors Chevy Blazer that was purchased because it offered the safety feature of an air bag.²⁹ On February 21st the car the car had approximately 14,000 miles on it and had been regularly serviced by the dealer-seller, Fulton Chevrolet.³⁰

The Accident

Alaimo left his home on February 21, 1995 and, because of snowy and icy conditions, took 5 to 6 minutes to drive a mile or

²⁷ Tr. 29-30.

²⁸ Vincent Alaimo is a self-made man and a prime example of the best that our country has to offer. Mr. Alaimo came from his native Italy in 1961 and by his own efforts he has created and managed several successful businesses over the years. (Tr. 39-57).

²⁹ Tr. 63-64.

³⁰ Tr. 65-66.

a mile and a half on an errand to buy milk.³¹ Alaimo was driving at 20 or 25 miles per hour when the Chevy Blazer lost traction and skidded across the road into a tree despite attempts to control the vehicle.³² The Chevy Blazer struck a tree "hit[ting] the bumper and went between the wheel and bent the hood and the fend[er] and crush[ed] the battery."³³

The Injuries: Part I

Alaimo testified:

Q. What happened to your body during the impact?

A. My body slice, like it want to go through the windshield and I shake...

Q. Your glasses came off in the impact?

A. Yes, sir.

Q. What about other parts Of your body? Did anything Hit any part of the inside of the vehicle?

A. My knees.

Q. What did they hit?

A. Under the steering wheel, steering wheel. right under the steering wheel and then they [went] forward the steering wheel and hit my chest. I have imprint on my chest when I got to the hospital. The steering wheel was imprinted

³¹ Tr. 60.

³² Tr. 82.

³³ Tr. 83; Exhibit 7.

here. The doctor saw the mark of the steering wheel.

Q. You mentioned your chin? What happened to your chin?

A. It loosened one [tooth] or two teeth and I went to the regular dentist and he look[ed] and he [said] sometime[s] it heal[s] by itself.³⁴

The Air Bag Did Not Inflate: Part II

The Chevy Blazer's air bag did not inflate on February 21, 1995 as result of the Blazer's impacting the tree.

Q. On the morning of February 21, 1995 was the air bag ever inflated at all at any time after your car hit the tree?

A. No, sir.

Q. Was it inflated to any degree as it was unfolding down and falling down to your lap.

A. No, sir.

Q. Was there any smoke or mist inside the car after the accident?

A. No, sir.

Q. Was there any powder or residue on your clothes or on your person or anywhere in the passenger compartment of the car after the care came to rest?

A. No, sir.³⁵

³⁴ Tr. 83-85; Exhibits 10-19, Tr. 85-87.

³⁵ Tr. 98-99; Exhibit 21, Tr. 99-100.

Conclusion II

The unambiguous testimony of the driver, an eyewitness, is that the air bag on the Alaimo Chevy Blazer did not inflate/deploy despite the severity of the accident.

*Summary of Dr. Omar's Testimony*³⁶

The Injuries: Part II

Dr. Omar testified that Alaimo "presented himself with pain across his anterior and posterior aspect of his knee, left shoulder, upper arm and pain in the neck and the lower back."³⁷ Examination "found [Alaimo] to have lower back pain and trigger point which is like spasm and pain in the muscles. The left lumbar area and also in the neck area. There was also tenderness involved in the muscles of his neck."³⁸ Dr. Omar noted that his colleague, Dr. Armstrong, examined Alaimo and concluded that he was suffering from myofascial pain³⁹ in left neck and shoulders and lumbar area and pain in his left knee.⁴⁰

Q. What was the focus of pain control center treatment of Mr. Alaimo?

A. Over the years he used to come to my office probably once or twice a year with acute pain problem[s] in his lower back. I think the knee

³⁶ Dr. Hussein Omar is a licensed medical doctor in the State of New York and is a Board Certified practitioner of pain management and anesthesiology. V.4 Tr. 4-9.

³⁷ V.4, Tr. 10.

³⁸ V.4, Tr. 11.

³⁹ "[P]ain stemming from the muscles." V.4, Tr. 13.

⁴⁰ V.4, Tr. 12-13.

problem Dr. Katz saw him and he had some arthroscopic surgery for it and the neck pain over the years subsided and he was complaining mainly [of his] lower back...⁴¹

Alaimo during the course of 5 to 6 years would do ordinary chores such a mowing his lawn causing a recurrence of pain and takes a physical therapy that caused the acute pain to subside until the next flare up.⁴²

A CAT scan taken at the beginning of Alaimo's treatment "showed a herniation in his back."⁴³ The CAT scan revealed, "a picture of a pinched nerved in the lower back...and the CAT scan shows at L4-5 and then at S-1 level the disc appeared to make some impression on [the nerve]..."⁴⁴

Alaimo displayed "symptoms like a pinched nerve...pain in the lower back...radiating down to the extremities."⁴⁵ The complaints of pain were consistent though the treatment.⁴⁶ Dr. Omar in 2000 opined:

It [the pain]⁴⁷ [is] now lasting for years .. he would have it the rest of his life.⁴⁸

⁴¹ V.4, Tr. 13.

⁴² V.4, Tr. 14.

⁴³ V.4, Tr. 14.

⁴⁴ V.4, Tr. 15-16.

⁴⁵ V.4, Tr. 16-17.

⁴⁶ V.4, Tr. 17.

⁴⁷ Radiating pain down his left and right lower extremities, pain in the right knee and stiffness. V.4. Tr. 31

⁴⁸ V.4, Tr. 31.

He came back 6/30/2000.
MRI shows degenerative changes...⁴⁹

Alaimo would continue in treatment and suffer, at various times, the same complaints through July 2004.⁵⁰ Dr. Omar's medical opinion is that Alaimo's complaints are a proximate result of the accident on February 21, 1995.⁵¹ The injuries are permanent.⁵²

Conclusion III

Vincent Alaimo suffered permanent injuries as a result of the failure of the air bag to deploy during the incident that took place on February 21, 1995.

*Summary of Dr. Katz' Testimony*⁵³

Dr. Katz testified that he had treated Alaimo with respect to a prior accident in August 26, 1994 but all the medical issues with respect to that incident were "resolved and he as back a full functioning, working person."⁵⁴

The Injuries - Part III

In February 1995

he was now in a different
accident...and that he hurt
his neck, and back, kind
of re-injured his shoulder

⁴⁹ V.4, Tr. 32.

⁵⁰ V.4, Tr. 33-39.

⁵¹ V.4, Tr. 42-43.

⁵² V.4, Tr. 44-45.

⁵³ Dr. Katz is a board certified orthopedic surgeon, a licenses physician in New York and a fellow of the American Academy of Orthopedic Surgeons. V.5, Tr. 17-22.

⁵⁴ V.5, Tr. 28-29, 29.

and very much hurt his knee
which was very obvious 'cause
it was black and blue...⁵⁵
basically his groin down to
his ankle.⁵⁶

Dr. Katz observed in injury to the chest: "there was a
contusion, it was sore, tender..."⁵⁷ Alaimo as in

obvious pain...I'd seen
him before and he wasn't
as bad as he was now.
He had a lot of pain in his
neck and really in both,
pain there now on the left
side as well as the right
shoulder, he had a lot of
pain in his knee...he was using
...a neck brace and a knee
immobilizer, one that keeps
the knee straight.⁵⁸

Dr. Katz testified that Alaimo's conditions were
degenerative and would, almost of a certainty, require his
having knee replacement surgery in the future.⁵⁹ Dr. Katz
testified that these injuries were caused by the February 21,
1995 car accident⁶⁰ and that these conditions will require
"further treatment, injections or repeat scope, knee
replacement."⁶¹

⁵⁵ Indicating a severe contusion, a direct impact on the leg and knee. V.5, Tr. 36.

⁵⁶ V.5, Tr. 30, 32, 33.

⁵⁷ V.5, Tr. 31.

⁵⁸ V.5, Tr. 33.

⁵⁹ V.5, Tr. 68-69, 70-71.

⁶⁰ V.5, Tr. 71-73.

⁶¹ V.5, Tr. 74.

Conclusion IV

Vincent Alaimo suffered permanent injuries as a result of the failure of the air bag to deploy during the incident that took place on February 21, 1995.

*Summary of Carlsson's Testimony*⁶²

Carlsson testified as to the federally mandated safety systems in the 1995 General Motors Chevy Blazer as being seat belt systems and a driver's air bag.⁶³ Carlsson testified that the air bag should deploy with 30-40 one thousands of a second.⁶⁴ The purpose of the air bag is a supplement to the seat belt system and is designed to provide aided safety because the seat belt itself is insufficient.⁶⁵

Carlsson testified that when he examined the vehicle in 1998

I did measure the extent of
the damage to the front [end]
in order to get an idea of
the collision severity⁶⁶

Carlsson testified that his examination showed that the seat belt had been "subject to very high force"⁶⁷ and that the degree

⁶² Carlsson is an automotive engineer with 40 years experience. V.6, Tr. 3, 4-13). Carlsson has investigated 2000 vehicle accidents in the United States, V.6, Tr. 13, and been qualified as an expert 50 times. V.6, Tr. 15. Carlsson, along with testifying doctors, have been found experts. V.6, Tr. 16.

⁶³ V.6, Tr. 20-22; 22-26.

⁶⁴ V.6, Tr. 26.

⁶⁵ V.6, Tr. 26-27.

⁶⁶ V.6, Tr. 28.

⁶⁷ V.6, Tr. 32.

of force exerted on the seat belt "tells me that in this case that airbag did not prevent the high force being exerted on the seatbelt. Usually it's the other way, the airbag deploys so rapidly that the airbag will prevent the forward movement of the driver, and the seatbelt in most cases will add very little of the restraining force, often you don't see any load marks on the seatbelt..."⁶⁸

The Air Bag Did Not Inflate: Part III

The air bag did not inflate/deploy.

Q. Do[es] the severity of those load marks on the seatbelt's D-ring, do they give you an indication as to whether or not the airbag properly deployed?

A. Yes. If the airbag had deployed...it [would] have taken over almost all load on the seatbelt, because the airbag back then on the '95 Chevy Blazer was overly powerful..."⁶⁹

The condition of the air bag itself demonstrated it had not deployed.

I looked at...the airbag itself...it was out of the steering wheel, buy what was unique about it, it looked like it was still neatly folded..."⁷⁰

⁶⁸ V.6, Tr. 32.

⁶⁹ V.6, Tr. 37.

⁷⁰ V.6, Tr. 39.

Carlsson stated that in deploying the folds would have been stretch out like the folds of a pillow case or table cloth that has been used.⁷¹ Carlsson testified that when the air bag is engaged a fuse set off something like an explosion that heats gas to several hundred degrees to deploy the bag.⁷² Carlsson testified that the lack of burn marks around the air bag's holes "make[s] me believe that this bag never really inflated all the way."⁷³

Carlsson concluded

I believe it [the air bag] was defective in this case, that the airbag should have deployed, and it doesn't deploy with a little puff. When an airbag deploys, there a real loud bang in the car, and that should happen so rapidly...You wouldn't see the high force on the seatbelt and the stretching of the seatbelt if the airbag had deployed.⁷⁴

Carlsson concluded that Alaimo's '95 Chevy Blazer was defective, that its safety systems failed to perform and that the failure of those systems was proximate cause of Alaimo's injuries.⁷⁵

⁷¹ V.6, Tr. 39, 45-46.

⁷² V.6, Tr. 24-25.

⁷³ V.6, Tr. 40.

⁷⁴ V.6, Tr. 62.

⁷⁵ V.6. Tr. 63-65

Conclusion V

Vincent Alaimo suffered permanent injuries as a result of the failure of the air bag to deploy during the incident that took place on February 21, 1995.

Re-Statement of Plaintiffs' Evidence

Alaimo presented the testimony of a completely disinterested witness, Leone, who stated that the air bag did not deploy. Leone's testimony corroborates Alaimo's testimony that the air bag did not deploy. Carlsson's expert evidence provides further evidence that the air bag did not deploy supporting the eyewitness account. The demonstrated fact of this case is that the air bag on the Alaimo vehicle did not deploy and such is demonstrated by the unbiased testimony of eyewitness Leone and clearly supported by other evidence demonstrating the reliability of Leone's account of the incident.

B.

Defendant's

General Motors presented four non-eyewitness experts the sum and substance of whose testimony is that notwithstanding the eyewitness accounts, the air bag deployed. The "experts" conclusion is based on their examination of the defective vehicle itself and then with comparisons with other vehicles or data that are derived not from this incident. Presumably, it

the Alaimo vehicle is defective, examination of its systems will not reveal competent data or, alternatively, data obtained from the vehicle may itself be defective. In any case, it is not such opinion evidence is insufficient to contradict the observation of a disinterested witness viewing events on the spot at the time of the occurrence.

Excerpt from Brent Benson's Testimony

Q. Based on your analysis do you have an opinion to a reasonable degree of engineering certainty as to whether the energy and change of velocity in this crash served or had a real potential for injury?

A. ...I think there was a great Potential for injury to the Occupants of this vehicle.⁷⁶

Benson stated that crash was at the extreme high end.⁷⁷

Excerpt from Brian Everest's Testimony

Q. ...Did you inspect the vehicle?

A. Yes.

Q. When...

A. In April, 1999...In Monticello.

Excerpt from Testimony of John W. Melvin

When answering the question "did the airbag deploy properly," Melvin's speculation was "I believe it did, just looking at that picture, it should have, certainly have."⁷⁸

⁷⁶ V.8, Tr. 44.

⁷⁷ Id.

⁷⁸ V.11, Tr. 54.

V.

ARGUMENT

Alaimo proved by a preponderance of the evidence that he was injured in a car accident on February 21, 1995 as result of the air bag on his 1995 General Motors Chevy Blazer failing to inflate or to deploy. Alaimo presented direct evidence in the form of eyewitness testimony that the air bag did not inflate. (See, *supra*, pp. 4-8). Alaimo's testimony that the air bag did not inflate was corroborated by Leone. (Compare, *supra*, pp. 4-8 with 10-11). Alaimo's medical evidence of injury and probable cause was not challenged by opposing medical evidence.

General Motor's evidence can be summed up by John Melvin's statement that the air bag certain should have deployed. That evidence and the other analysis/opinion speculation is insufficient to confute the eyewitness evidence.

VI.

CONCLUSION

WHEREFORE, for all of the foregoing reasons and for the reasons it is respectfully prayed that the judgment appealed from be vacated and that appellant be awarded such other and further relief as the Court deems in the interest of justice.

Dated: Montclair, New Jersey
November 2005

Respectfully submitted,

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22 NYCRR 130-1.1 Certificate

Pursuant to NYCRR 130-1.1, Ronald Cohen, an attorney admitted to practice before the Courts of the State of New York, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the foregoing document are not frivolous.

Ronald Cohen

Compliance

Ronald Cohen certifies that the Appellants' Brief in the captioned matter is double-spaced; that the type face is Courier New 12 point and that it consists of 3161 words, exclusive of the tables of contents and authorities.

Ronald Cohen